No. 82-1474

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

CHARLES R. HOOVER, HOWARD H. KARMAN, ROBERT D. MYERS and HAROLD J. WOLFINGER,
Petitioners,

vs.

EDWARD RONWIN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONERS

KURT W. MELCHIOR
One Embarcadero Center,
25th Floor
San Francisco, CA 94111
(415) 398-3344
Attorney for Amicus Curiae National Conference of Bar Examiners

Of Counsel:
ALLAN ASHMAN
333 North Michigan Avenue,
Suite 1025
Chicago, IL 60601
JOHN E. HOLT-HARRIS, JR.
DEGRAFF, FOY, CONWAY,
HOLT-HARRIS & MEALEY
90 State Street
Albany, NY 12207
JAN T. CHILTON
SEVERSON, WERSON, BERKE
& MELCHIOR
A Professional Corporation
One Embarcadero Center,
25th Floor
San Francisco, CA 94111

BOWNE OF SAN FRANCISCO, INC. • 180 NINTH ST. • S.F., CA 94103 • (415) 864-6500

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MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE

The National Conference of Bar Examiners ("NCBE") moves for leave to file the attached Brief of Amicus Curiae in support of petitioners. Petitioners have consented to the filing of this amicus brief; respondent Ronwin has withdrawn his consent previously given.

The NCBE is a national service organization for bar examiners like the petitioners in this case. The NCBE has an organizational interest in this case because the holding below will have serious impact on the bar examining process and will create potential liability for the NCBE as the organization which prepares and scores the Multistate Bar Examination and the Multistate Professional Responsibility Examination.

With the court of appeals' permission, the NCBE filed amicus curiae briefs in support of each petitioners' two petitions for rehearing in that court, and with this Court's permission, the NCBE filed an amicus curiae brief in support of the petition for writ of certiorari.

In the attached amicus curiae brief, the NCBE demonstrates why this Court's recent decision in *District of Columbia Court of Appeals v. Feldman*, ... U.S. ....., 103 S.Ct. 1303 (1983) prevents federal district courts from assuming jurisdiction over antitrust suits which, like Ronwin's, seek to attack collaterally the final judicial determination of a state's highest court in denying an applicant admission to practice law. Application of the *Feldman* holding to cases such as Ronwin's avoids a severe and unnecessary intrusion on the states' compelling interest in regulating the legal profession.

The attached amicus curiae brief also demonstrates that petitioners' acts were exempt from antitrust scrutiny under *Parker v. Brown*, 317 U.S. 341 (1943). The Arizona Committee on Examinations and Admissions acted as the state itself in its sovereign capacity and therefore was absolutely immune without meeting the twofold test restated in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 455 U.S. 97, 105 (1980).

The amicus brief also discusses the proper application of the *Midcal* test to public entities, showing that such entities need not demonstrate that their actions were "compelled" by the state or were subject to "active state supervision." All a public entity must show to claim state action immunity is that its acts were the kind contemplated by its authorizing legislation. The committee's challenged acts met that test.

Finally, the attached amicus curiae brief shows that because the committee was purely an advisory body whose sole function was to examine applicants and recommend

that the Arizona Supreme Court grant admission to those applicants the committee found qualified, the committee's actions were also immune from antitrust scrutiny under the *Noerr-Pennington* doctrine.

Counsel for amicus contacted respondent before commencing work on this brief, and respondent at that time graciously consented to its filing. Recently, when work on the brief had been substantially completed, counsel for amicus wrote respondent, requesting the written consent letter required by this Court's Rule 36.2. Respondent then changed his mind, necessitating this application.

For all of these reasons, the NCBE respectfully requests that its motion for leave to file the attached brief of amicus curiae be granted.

DATED: August 15, 1983.

Respectfully submitted,

KURT W. MELCHIOR
One Embarcadero Center,
25th Floor
San Francisco, CA 94111
(415) 398-3344
Attorney for Amicus Curiae
National Conference of
Bar Examiners

Of Counsel:
ALLAN ASHMAN
333 North Michigan Avenue,
Suite 1025
Chicago, IL 60601
JOHN E. HOLT-HARRIS, JR.
DEGRAFF, FOY, CONWAY,
HOLT-HARRIS & MEALEY
90 State Street
Albany, NY 12207
JAN T. CHILTON
SEVERSON, WERSON, BERKE
& MELCHIOR
A Professional Corporation
One Embarcadero Center
25th Floor
San Francisco, CA 94111

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BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONERS

Amicus curiae, the National Conference of Bar Examiners("NCBE"), respectfully submits this brief in support of petitioners Charles R. Hoover, et al.

SUMMARY OF ARGUMENT

The regulation of attorneys lies at the core of the states' power to protect their citizens. The bar examination is an essential tool in the states' exercise of that power. In each state, the highest court retains the power to grant or deny admission to practice, but has delegated to a board of eminent practitioners the highly sophisticated, technical and time-consuming chores of preparing, administering and grading the bar examination.

Federal antitrust review of the bar examination grading process would serve no Congressional purpose. It would not open entry into the legal profession to free competition. It would, however, severely infringe upon the states' compelling interest in regulating their own bars. It would also impose significant additional litigation burdens on the federal courts.

These evils are avoided by following this Court's recent decision in *District of Columbia Court of Appeals v. Feldman*, ... U.S. ....., 103 S.Ct. 1303 (1983). There, this Court held that the federal district courts lack jurisdiction to review individual denials of admission to practice because such denials are final judicial action reviewable only in this Court. Though *Feldman* concerned constitutional attacks on denials of admission, its reasoning applies with equal force to prevent federal district courts from entertaining similar collateral attacks by way of antitrust actions.

The district court was also correct in dismissing this action because it involves exempt state action. Restraints of trade imposed by the state itself, acting in its sovereign capacity, are immune from antitrust scrutiny. *Parker v. Brown*, 317 U.S. 341 (1943). For these purposes, any state body which makes decisions and sets policy for the state as a whole partakes to that extent of the state's sovereignty and is immune from antitrust attack. Pursuant to the Arizona Supreme Court's directions, the Arizona Committee on Examinations and Admissions set and implemented statewide policy on the administration and grading of bar examinations. It acted as the state itself and was absolutely immune.

The two-pronged test restated in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) should not be applied to such state agencies. But to the extent that test is applied, it is met here.

The committee was duly authorized by the Arizona Supreme Court to grade bar examinations. The supreme court necessarily contemplated that the committee would

choose a particular method of grading, the kind of activity challenged here. Whatever method was chosen, the result would restrain trade by excluding those receiving low grades from admission to practice. That is all that is required to show a clearly articulated and affirmatively expressed state policy, at least when a public agency's acts are attacked.

A public agency, particularly a state agency, should not have to show that its acts were actively supervised by the state. But if that requirement must be met, the Arizona Supreme Court's review and supervision of the committee's work does so.

Finally, the *Noerr-Pennington* doctrine shields the committee's acts from antitrust review. The committee's only function was to recommend to the Arizona Supreme Court that the court grant or deny admission to particular applicants. Such initiation of judicial action is not proscribed by the antitrust laws.

For all of these reasons, the district court correctly dismissed the complaint in this action. Its judgment should be reinstated and the erroneous judgment of the Ninth Circuit Court of Appeals should be reversed.

INTEREST OF AMICUS CURIAE

Organized in 1931, the NCBE is a private, nonprofit corporation affiliated with the American Bar Association. The NCBE's membership includes officers and members of boards of bar examiners and of bar character committees of all 50 states, the District of Columbia, Guam, Puerto Rico and the Virgin Islands. The NCBE's membership also includes judges of state courts which control admission of lawyers to practice.

Among the NCBE's objectives are improving the quality of bar examinations, conducting studies and distributing information about bar examinations, and encouraging the maintenance of high standards by state boards of bar examiners. The NCBE also cooperates with other organiza-

tions representing the bench, bar and law schools in solving problems relating to legal education and bar admissions.

In cooperation with the American Bar Association and the American Association of Law Schools, the NCBE has promulgated a Code of Recommended Standards for Bar Examiners. The Code's 29 standards cover all aspects of bar examinations, from who should serve as a bar examiner to how bar examinations should be graded.

The NCBE has published *The Bar Examiners' Handbook* (S. Duhl 2d ed. 1980) which provides extended commentary on each of the 29 Recommended Standards for Bar Examiners. The NCBE also publishes a monthly periodical, *The Bar Examiner*, featuring articles by eminent authorities on admission standards and bar examination procedures, and a *Litigation Report*, detailing the progress of and analyzing the issues in litigation against bar examiners. The NCBE holds conventions, seminars and other instructional sessions for bar examiners and judges.

The NCBE maintains a library of more than 6,500 bar examination essay questions. On request, the NCBE sends questions and model answers to bar examiners throughout the nation for use in preparing bar examinations.

Since 1971, the NCBE has compiled, administered and scored the Multistate Bar Examination ("MBE"). The MBE is a multiple choice examination containing 200 questions covering contracts, torts, constitutional law, criminal law, evidence and real property. At present, 46 states, the District of Columbia and the Virgin Islands use the MBE as part of their bar examinations.

The NCBE has recently established the Multistate Professional Responsibility Examination ("MPRE"). First given in 1980, the MPRE is now used in 27 jurisdictions. The MPRE is a 50-question multiple choice test on legal ethics.

The NCBE has an organizational interest in this case because antitrust review of the grading of bar examinations

will interfere with the NCBE's goals of improving the quality of bar examinations and of encouraging the maintenance of high professional standards among bar examiners. NCBE also has an interest in the application of the antitrust laws to bar examiners, both on behalf of its bar examiner members and in its own right as the organization which prepares and scores the MBE and MPRE.

ARGUMENT

1. A Federal Antitrust Action Cannot be Used to Challenge a Failing Grade on a Bar Examination

a. The States Have a Compelling Interest in Regulating Admission to Their Bars

Time and again, this Court has "recognize[d] that the states have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions." *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975).

The states' interest "in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.' [Citations.]" *Ibid.* Indeed, this Court has held that the "regulation of the activities of the bar is at the core of the State's power to protect the public." *Bates v. State Bar of Arizona*, 433 U.S. 350, 361 (1977); *accord: District of Columbia Court of Appeals v. Feldman, supra*, 103 S.Ct. at 1315-1316 n. 16; *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, ... U.S. ....., 102 S.Ct. 2515, 2522-2523 (1982).

Federal intrusions into this area of critical state concern have intentionally been few in number and limited in scope. *See, e.g., Konigsberg v. State Bar of California*, 353

U.S. 252, 273 (1957); *In re Summers*, 325 U.S. 561, 570-571 (1945). It remains true that

> Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions. The States prescribe the qualifications for admission to practice and the standards of professional conduct. They also are responsible for the discipline of lawyers.

Fn. omitted; *Leis v. Flynt*, 439 U.S. 438, 442 (1979).

Though this Court has reviewed other aspects of bar admissions from time to time, this case is the first to present bar examination procedures for this Court's review.

b. The Bar Examination Is an Essential Tool in Regulating Admission to Practice

The bar examination is an essential tool in the states' regulation of admission to the bar. Though "[t]he bar examination seems to be a favorite whipping boy of critics of the system," F. Klein, S. Leleiko & J. Mavity, *Bar Admission Rules and Student Practice Rules*, 39 (1978) (hereafter "*Bar Admission Rules*"), no one has yet suggested a satisfactory alternative to the bar examination for evaluating an applicant's knowledge of the law, ability to analyze legal problems and aptitude for the practice of law. *See* O'Hara & Klein, *Is the Bar Examination an Adequate Measure of Lawyer Competence?*, 50 Bar Examiner 28 (1981).

Oral bar examinations predate this nation, and written bar examinations were given as early as 1855. Sprecher, *Fifty Years of Service*, 50 Bar Examiner 4 (1981); Karger, *The Role of the NCBE in the Bar Admission Process: Its First Fifty Years*, 50 Bar Examiner 7, 8-9 (1981). By now, written bar examinations are the primary tool for screening bar applicants in all 50 states. Karger, *supra*, 50 Bar Examiner at 9; *Bar Admission Rules*,

34-36. The Devitt Committee has recommended that a federal bar examination be instituted as one means of improving and assuring the quality of legal representation in the federal courts. *Final Report of the Committee to Consider Standards for Admission to Practice in the Federal Courts* (1979), reprinted at 83 F.R.D. 215, 224-225 (hereafter "Final Report").

Over the past 50 years, under the NCBE's leadership, the preparation, grading and administration of bar examinations have become increasingly sophisticated. *See Karger, supra,* 50 Bar Examiner at 9-14. At the same time, the complexity of those tasks has vastly increased, together with the number of applicants taking bar examinations. *The Bar Examiners' Handbook,* 312 (S. Duhl 2d ed. 1980); Smith, *1981 Bar Examination Statistics,* 51 Bar Examiner 27 (1982); *see* Covington, *The Preparation and Operation of the Multistate Bar Examination,* 50 Bar Examiner 20 (1981); Covington, *Administering the Multistate Professional Responsibility Examination,* 50 Bar Examiner 26 (1981). As a result, though each state's highest court retains the ultimate authority to grant or deny admission to practice, each has delegated to a committee, commission or board of bar examiners the duties of preparing, grading and administering the bar examination. *Bar Admission Rules,* 29-33.

These bar examiners are skilled practicing attorneys "with scholarly attainments and an affirmative interest in legal education and requirements for admission to the bar." *The Bar Examiners' Handbook,* at 95. In general, these eminent practitioners volunteer their time and expertise to assist the states' highest courts perform an essential, but time-consuming and technical task, which those courts could not otherwise accomplish. *See id.,* at 99.

Bar examiners bring a high degree of professionalism to their task. *The Bar Examiners' Handbook,* at 95-97. Since 1958, they have operated under a Code of Recommended Standards for Bar Examiners promulgated by the NCBE

in cooperation with the American Bar Association and the Association of American Law Schools. Karger, *supra*, 50 Bar Examiner at 9-10. That Code has recently been revised and republished with extensive commentary as *The Bar Examiners' Handbook* (S. Duhl 2d ed. 1980). *Id.*, 11-12. The Code specifies standards on all aspects of the bar examination process, including the grading of bar examinations and the provision of review procedures for disappointed applicants. *The Bar Examiners' Handbook*, at 271-302, 303-309. Through these means, bar examiners have imposed on themselves a high degree of self-regulation.

In addition, bar examiners are subject to the scrutiny, supervision and direction of the states' highest courts. Before bar examinations are given, the high courts supervise the preparation of the tests and the grading procedures to be employed. *See, e.g.*, Ariz.Sup.Ct.R. 28(c) (VII) (B) (except as otherwise noted all references are to the rules in effect in February 1974). After bar examinations are given, the high courts again exercise their control and supervision by exercising their discretion *de novo* in granting or denying admission to applicants, *see, e.g.*, Ariz.Sup.Ct.R. 28(a); *Application of Levine*, 97 Ariz. 88, 397 P.2d 205, 207 (1964), and by providing explicit procedures for review, ultimately by the high court itself, of a disappointed applicant's failing grade, *The Bar Examiners' Handbook*, at 303-309; *Bar Admission Rules*, 34-36, 40; *see, e.g.*, Ariz.Sup.Ct.R. 28(c)(XII)(G) (amended effective June 15, 1976). This is judicial action. *See* pp. 12-14, *infra*.

c. Federal Antitrust Review of Bar Examinations Would Disrupt the Bar Examination Process and Unwisely Shift Control Over Bar Admissions to the Federal Courts

The bar examination process now runs relatively smoothly along the lines discussed above. That process will

be severely disrupted if disappointed applicants are allowed to challenge their failing grades in federal antitrust actions like Ronwin's.

As Ronwin, himself, illustrates, disappointed bar applicants can be tireless litigants. *See Ronwin v. Committee on Examinations and Admissions*, 419 U.S. 967 (1974); *Application of Ronwin*, 113 Ariz. 357, 555 P.2d 315 (1976), *cert. denied*, 430 U.S. 907 (1977), 439 U.S. 828 (1978); *Ronwin v. Shapiro*, 657 F.2d 1071 (9th Cir. 1981); *see also, In re Ronwin*, ... Ariz. ....., ... P.2d ....., Nos. SB52-8, SB52-9 (July 6, 1983); *Ronwin v. Segal*, 634 F.2d 636 (9th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); *Ronwin v. Fair Employment Practices Comm'n*, 409 U.S. 811 (1972).

Disappointed bar applicants will have little trouble framing a Sherman Act complaint which will survive a motion to dismiss, unless such actions are barred by the state action or *Noerr-Pennington* doctrines discussed below. By its very nature, the bar examination process involves the exercise of discretion and excludes some would-be competitors from competition. Since bar examiners are practicing lawyers, it is easy to blame such exclusion on the bar examiners' supposed anticompetitive motives. Compl., ¶ VII.

Nor will it be possible to weed out many of these complaints by summary judgment, *Poller v. Columbia Broadcasting Sys.*, 368 U.S. 464, 473 (1962), particularly since anticompetitive motive may be inferred from anticompetitive effect, *Helix Milling Co. v. Terminal Flour Mills Co.*, 523 F.2d 1317, 1321 (9th Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976). Antitrust litigation is notoriously expensive to defend, normally involving copious discovery. *See* Herndon, et al., *Expediting and Controlling Antitrust Litigation—The Demand for Cost Containment*, 51 Antitrust L.J. 423 (1983); E. Timberlake, *Federal Treble Damage Antitrust Actions*, § 1.03, p. 2 (1965).

Even if bar examiners were to prevail at trial in each Ronwin-style antitrust action, the bar examination process

would be severely disrupted. The cost of defending such actions, the threat of liability for treble damages and attorneys' fees, the inconvenience and loss from having to spend long hours in depositions, answering interrogatories and preparing defenses would all serve to deter eminent practitioners from serving as bar examiners. Bar examiners might prevail at trial, "[b]ut in the meantime the antitrust suit will have strategic effects, will impose discovery and litigation burdens, and may intimidate public officials in the performance of their duties—all on the basis of the conclusory allegations common in such cases." Areeda, *Antitrust Immunity for "State Action" after Lafayette*, 95 Harv.L. Rev. 435, 451 (1981).

Antitrust review of bar examination grading would also improperly shift the ultimate responsibility for bar admissions from the states to the federal courts. *See* pp. 24-26, *infra*. Federal judges and juries, not the justices of the states' highest courts, would be the final arbiters of who should be admitted to practice. Moreover, admissions decisions would depend, in the end, on antitrust concepts, not the quite different concerns of quality, competence, and protection of the public which the bar examinations process now serves.

Allowing antitrust challenges to failing grades on the bar examination would impose significant burdens on the federal courts. If only ten percent of those who failed bar examinations filed antitrust actions, another 2,000 cases would be added each year to the federal courts' already overburdened dockets.[1]

In addition, the federal courts would face a rising tide of antitrust claims by disappointed applicants for the many other types of professional licenses issued by state regulatory boards commonly composed of members of the regulated profession. *See, e. g., Gambrel v. Kentucky Bd. of Dentistry*, 689 F.2d 612 (6th Cir. 1982), *cert. denied*, ...

[1] In 1981, 20,219 applicants took and failed bar examinations in American jurisdictions. Smith, *supra*, 51 Bar Examiner, at 27.

U.S. ....., 103 S.Ct. 1198 (1983); *Euster v. Eagle Downs Racing Ass'n*, 677 F.2d 992 (3d Cir.), *cert. denied*, ... U.S. ....., 103 S.Ct. 388 (1982); *Benson v. Arizona State Bd. of Dental Examiners*, 673 F.2d 272 (9th Cir. 1982).

Antitrust review would constitute a substantial federal intrusion upon the states' "compelling interest" in regulation of admission to the practice of law. In *Goldfarb v. Virginia State Bar, supra*, 421 U.S. at 793, this Court observed that "[i]n holding that certain anticompetitive conduct by lawyers is within the reach of the Sherman Act we intend no diminution of the authority of the State to regulate its professions." As in *Bates v. State Bar of Arizona, supra*, 433 U.S. at 360 n. 11, "[a]llowing the instant Sherman Act challenge to [bar examination grading] would have precisely that undesired effect."

Allowing actions like Ronwin's would not measurably advance antitrust objectives. Admission to state bars is not and should not be determined by economic forces. To protect the public from incompetent would-be lawyers, every state has displaced "unfettered economic freedom," *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978), with regulation of admission to practice in order to weed out unqualified applicants. *Bar Admission Rules*, at pp. 34-36. The trend is toward tighter regulation, not more economic freedom. *See, e.g.*, Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?* 42 Fordham L.Rev. 227 (1973); Burger, *Some Further Reflections on the Problems of Adequacy of Trial Counsel*, 49 Fordham L.Rev. 1 (1980); *Final Report, supra*, 83 F.R.D. at 224-225.

Antitrust review of bar examination grading will not reverse that anticompetitive trend toward better screening of bar applicants in order to protect courts and clients. Antitrust review will impose undesirable new burdens on the federal courts, intrude upon the states' exclusive prerogatives in regulating admission to their bars, and seriously disrupt the bar examination process.

d. District of Columbia Court of Appeals v. Feldman Bars Individual Antitrust Challenges to Failing Bar Examination Grades

This Court's recent decision in *District of Columbia Court of Appeals v. Feldman, supra,* 103 S.Ct. 1303 provides a clear path to the resolution of this suit and avoidance of the problems which federal antitrust review of state bar admissions decisions would entail.

In *Feldman,* this Court held that denial of admission to practice is a final judgment of the state's highest court, a judicial act. *Id.,* at 1311-1314. Such judgments are reviewable only in this Court. The federal district courts lack subject matter jurisdiction to review such judgments. They have no power to entertain complaints seeking to compel an individual's admission to practice law. *Id.,* at 1311, 1314 n. 15, 1315; *see* n. 2, *infra,* re court of appeal ruling on Feldman's antitrust claims.

According to *Feldman,* a disappointed bar applicant must raise even a constitutional attack in the state court to preserve the point for possible review by this Court. "By failing to raise his claims in state court a plaintiff may forfeit his right to obtain review of the state court decision in any federal court." *Id.,* at 1315 n. 16.

The same reasoning applies with equal force to prevent federal district courts from entertaining antitrust complaints like Ronwin's. Ronwin seeks collateral review of the Arizona Supreme Court's decision denying him admission to practice. His complaint alleges that as a result of defendants' alleged antitrust violation, he was artificially prevented from entering competition as an Arizona lawyer and thus suffered $400,000 damages. Compl., ¶¶VII, IX.

Nothing barred Ronwin from raising this antitrust claim as part of his initial state court challenge to his failing grade. *See Ronwin v. Committee on Examinations and Admissions,* 419 U.S. 967 (1974). *District of Columbia Court of Appeals v. Feldman, supra,* 103 S.Ct. at 1306-1307, 1313

n. 14 and *Bates v. State Bar of Arizona, supra*, 433 U.S. at 356-357 demonstrate that antitrust objections can and should be raised in the course of any state court challenge to an admission or disciplinary ruling.[2] By failing to raise

[2]Federal district courts have exclusive jurisdiction over private treble damage actions under the federal antitrust laws. 15 U.S.C., § 15. But, as *Feldman* and *Bates* show, that does not prevent state courts from considering federal antitrust claims in deciding whether to admit or discipline members of their bars. *See also, Lynch Display Corp. v. National Souvenir Center, Inc.*, 640 S.W.2d 837 (Tenn.Ct.App. 1982). In the same way, it has long been held that federal regulatory agencies can and must consider the antitrust implications of their actions. *See, e.g., Denver & R.G. R.R. Co. v. United States*, 387 U.S. 485, 492-498 (1967); *California v. Federal Power Comm'n*, 369 U.S. 482 (1962).

Requiring antitrust challenges to admission or disciplinary decisions to be raised in state court proceedings would allow the state supreme courts to avoid unintended anticompetitive effects of their decisions or rules. It would also permit those courts to clearly articulate state policy on the anticompetitive effects they do intend. Compare *District of Columbia Court of Appeals v. Feldman, supra*, 103 S.Ct. at 1315 n. 16. Requiring such issues to be raised in state court would also obviate the otherwise difficult question of an appropriate remedy, assuming an antitrust violation were found. *See, Community Communications Co. v. City of Boulder*, ... U.S. ..., 102 S.Ct. 835, 843 n. 20 (1982); I P. Areeda & D. Turner, *Antitrust Law*, ¶ 217a, pp. 101-108 (1978).

The seemingly contrary holding in *Feldman v. Gardner*, 661 F.2d 1295, 1303 (D.C.Cir. 1981), *cert. denied*, ... U.S. ..., 102 S.Ct. 3483 (1982), *rev'd on other grounds sub nom., District of Columbia Court of Appeals v. Feldman, supra*, was made without benefit of this Court's reasoning in *District of Columbia Court of Appeals* v. *Feldman, supra*, and appears to depend in large part on the same rationale this Court later rejected with respect to Feldman's constitutional claims. Compare 661 F.2d at 1303 n. 61 with 661 F.2d at 1309-1319.

Having incorrectly held that the district court had jurisdiction to hear Feldman's antitrust claims, the court of appeals correctly found that the District of Columbia Court of Appeals acted as the state itself in promulgating and enforcing its rules governing bar admissions, and was therefore entitled to state action immunity

his antitrust claim in the Arizona Supreme Court, Ronwin lost his right to federal court review of that claim.

Any different holding would allow disappointed bar applicants an easy escape from *Feldman*'s rule that the federal district courts are without jurisdiction to review a final order of a state supreme court denying a particular applicant admission to the bar. *Feldman, supra*, 103 S.Ct. at 1316. Any would-be lawyer could secure collateral review in the district court by the simple means of phrasing his claim in antitrust terms rather than constitutional language. Surely, *Feldman* was not intended to be limited to such niceties of pleading.

In short, *Feldman* points the way to a proper reconciliation of the states' compelling interest in regulation of admission to the practice of law with the federal antitrust laws. A bar applicant who claims he was denied admission due to some unauthorized anticompetitive practice may raise his claim before the state's highest court on review of the denial of his admission. If the state court finds that the applicant was the victim of an unauthorized anticompetitive practice, it will presumably order the applicant's admission, or this Court may do so on direct review.

A later federal antitrust action will be precluded. The disruptive effects of antitrust review of state bar admissions decisions by lower federal court judges and juries will be avoided.

2. Grading Bar Examinations Is State Action Exempt From Antitrust Scrutiny

a. The Committee on Examinations and Admissions Acted as the State in Its Sovereign Capacity and Therefore Is Exempt

This Court has repeatedly held that the Sherman Act does not prohibit restraints of trade imposed by the State itself.

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from the antitrust laws. 661 F.2d at 1304-1318. This Court denied Feldman's petition for certiorari from this holding. *Feldman v. District of Columbia Court of Appeals*, ___ U.S. ___, 102 S.Ct. 3483 (1982).

Parker v. Brown, supra, 317 U.S. at 350-352; *New Motor Vehicle Bd. v. Orrin W. Fox Co., supra,* 439 U.S. at 109; *Bates v. State Bar of Arizona, supra,* 433 U.S. at 359-360.

This "state action exemption" arises from our "dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority." *Parker v. Brown, supra,* 317 U.S. at 351; *City of Lafayette v. Louisiana Power & Light Co.,* 435 U.S. 389, 412 (1978). In other words, the "*Parker* exemption reflects the federalism principle that we are a nation of *States* . . . ." *Community Communications Co. v. City of Boulder, supra* n. 2, 102 S.Ct. at 840.

Because of its fundamental, federalist nature, the *Parker* exemption absolutely immunizes from antitrust attack all acts taken by a state acting in its sovereign capacity. Such sovereign acts need not meet the two-pronged test articulated in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., supra,* 445 U.S. at 105.[3] *Community Communications Co. v. City of Boulder, supra,* 102 S.Ct. at 841; *Parker v. Brown, supra,* 317 U.S. at 350-352; accord *Feldman v. Gardner, supra n.* 2, 661 F.2d at 1305; *Foley v. Alabama State Bar,* 648 F.2d 355, 359 (5th Cir. 1981); *New Mexico v. American Petrofina, Inc.,* 501 F.2d 363, 372 (9th Cir. 1974).

Instead, the *Midcal* test is applied only to municipalities, private persons and others who are not the state and thus cannot act in a sovereign capacity.[4] The *Midcal* test recog-

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[3] As restated in *Midcal*, the test is "[f]irst, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., supra,* 445 U.S. at 105.

[4] The fact that the committee's members are lawyers, that is, members of the regulated industry, and serve on the committee only on a part-time basis does not deprive their acts of state action immunity. In *Parker*, the program committees which established

nizes "that a State may frequently choose to effect its policies through the instrumentality of [such non-state entities]." *Community Communications Co. v. City of Boulder, supra,* 102 S.Ct. at 840. At the same time, the *Midcal* test assures that "[t]he national policy in favor of free competition cannot be thwarted by casting . . . a gauzy cloak of state involvement over what is essentially a private price fixing arrangement." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., supra,* 445 U.S. at 106.

Thus, as this Court most recently summarized in *Community Communications Co. v. City of Boulder, supra,* 102 S.Ct. at 841, the *Parker* exemption is available to a state whenever it acts as sovereign, but to other entities only when their acts meet the *Midcal* test:

> Our precedents thus reveal that Boulder's moratorium ordinance cannot be exempt from antitrust scrutiny *unless it constitutes the action of the State of Colorado itself in its sovereign capacity,* see *Parker, or* unless it constitutes municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy [citations].

Emphasis added.

This Court's state action cases have not, as yet, squarely addressed the question whether state sovereignty resides in less than all of the many officers and entities of which modern state governments are composed. *See* Areeda,

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the prorate program, the particular restraint of trade under attack, were likewise composed of producers and packers, members of the regulated industry. 317 U.S. at 346. In *Orrin W. Fox Co.*, the state required four of the nine members of the New Motor Vehicle Board to be car dealers, members of the regulated industry. Cal. Veh.Code, § 3001. As this Court said of *Goldfarb v. Virginia State Bar, supra,* in *City of Lafayette v. Louisiana Power & Light Co., supra,* 435 U.S. at 411 n. 41: "[T]he fact that the ancillary effect of the State Bar's policy, or even the conscious desire on its part, may have been to benefit the [member-]lawyers it regulated cannot transmute the State Bar's official actions into those of a private organization."

supra, 95 Harv.L.Rev. at 441-442. Nevertheless, this Court's decisions suggest that the proper answer is that sovereignty resides in all parts of state government which make decisions and set policy for the state as a whole, including, in this case, the Arizona Committee on Examinations and Admissions.

Parker itself points the way. That case involved three levels of California state government. The state legislature enacted the Agricultural Prorate Act. Under the act, a statewide Agricultural Prorate Advisory Commission was established. Finally, upon petition by agricultural producers, a program committee of such producers and as many as two packers could be formed. 317 U.S. at 344, 346-347. The program committee would propose a prorate program. If approved by the Prorate Advisory Commission and a referendum of affected producers, the program would go into effect under the administration of the program committee. *Id.* at 347.

In *Parker*, the state legislature set the overall policy of excluding competition from selected agricultural markets, but the program committees, subordinate state administrative agencies composed of members of the regulated industry, decided upon and enforced the particular restraints of trade which Brown challenged. This Court held the trade restraints immune from antitrust scrutiny, finding that "in adopting and enforcing the prorate program," the state "as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit." *Id.* at 352.

Likewise, in *New Motor Vehicle Board v. Orrin W. Fox Co., supra*, 439 U.S. at 109-110, this Court held that the state action exemption applied to actions of the California New Motor Vehicle Board, a subordinate state administrative agency, four of whose nine members were from the regulated industry. The board established specific trade

restraints under an extremely general delegation of power from the California Legislature. *See id.*, at 98 n. 1.

This Court has also recognized in other contexts that sovereignty resides not only in a state's legislature, governor and supreme court, but in its subordinate administrative agencies as well. Speaking of the Mississippi Public Services Commission, this Court recently held:

> We acknowledge that "the authority to make . . . fundamental . . . decisions" is perhaps the quintessential attribute of sovereignty. [Citation.] Indeed, having the power to make decisions and to set policy is what gives the State its sovereign nature. *See Bates v. State Bar of Arizona*, 433 U.S. 350, 360 . . . . It would follow that the ability of a state legislative (or, as here, administrative) body—which makes decisions and sets policy for the State as a whole—to consider and promulgate regulations of its choosing must be central to a State's role in the federal system.

Federal Energy Regulatory Comm'n. v. Mississippi, ... U.S. ....., 102 S.Ct. 2126, 2138 (1982).

These decisions teach that state sovereignty is not isolated at the highest legislative, executive and judicial levels of government. If an arm of state government makes decisions and sets policy for the state as a whole, it acts to that extent as the state itself in its sovereign capacity.

In this case, the Arizona Committee on Examinations and Admissions partook of Arizona's sovereignty. The committee was created by the Arizona Supreme Court, the state's highest judicial authority, and is directly responsible to that body. Ariz.Sup.Ct.R. 28(a). The committee is an administrative aid to the court, helping it perform the judicial task of granting or denying admission to practice. *See Richardson v. McFadden*, 563 F.2d 1130, 1132 (4th Cir. 1977) (Hall, J., concurring), *cert. denied*, 435 U.S. 968 (1978); *Feldman v. State Board of Law Examiners*, 438 F.2d 699, 702 (8th Cir. 1971). The committee carries out

testing functions which the supreme court has neither the time nor the technical skills to perform itself.[5]

Within the narrow realm of its competence—preparation, administration and grading of the bar examination—the committee makes decisions and sets statewide policy. As in *Parker*, the highest level of state government has adopted the overall policy of removing a segment of commerce from free competition—here, entry into the legal profession—and has delegated to a lower state agency the job of developing the particular regulations (or restraints of trade) needed to carry the overall policy into effect.[6] Ariz.Sup.Ct.R. 28(a), (c).

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[5]In California, for example, the Committee of Bar Examiners administered 12,370 examinations in 1982. Smith, *1982 Bar Examination Statistics*, 52 Bar Examiner 24 (1983). A study of the California committee concluded that in 1977 (when considerably fewer applicants took the examination), the committee handled 2.3 million separate transactions. Booz, Allen & Hamilton, Inc., *A Diagnostic Study of the Operations of the Offices of the Committee of Bar Examiners The State Bar of California* (March 1978). California's seven supreme court justices could not perform their many other judicial responsibilities if they participated personally in any significant way in this vast effort.

[6]The fact that both the overall anticompetitive policy and the particular trade restraints here were set by state agencies distinguishes this case from *Goldfarb v. Virginia State Bar, supra*. In *Goldfarb*, the Virginia Supreme Court had not adopted an anticompetitive policy in the pricing of legal services. To the contrary, its ethical codes directed that lawyers not be controlled by fee schedules. 421 U.S. at 789 & n. 19. The fee schedules *Goldfarb* struck down were "essentially a private anticompetitive activity" of the County Bar, a voluntary organization. *Id.*, at 790, 792. The State Bar, a state agency for some limited purposes, enforced this essentially private restraint which had not been authorized, reviewed or approved by the state. *Id.*, at 791.

Goldfarb was thus similar to *Midcal* and *Schwegmann Bros. v. Calvert Corp.*, 341 U.S. 384 (1951). In those cases, state bodies enforced uniform resale prices set by private parties, and this Court held there was no state action immunity. By contrast, here the alleged trade restraint—the method of scoring the bar exami-

As *Parker* and *Orrin W. Fox Co.* hold, under such circumstances the acts of the lower state agency are those of the state itself acting as sovereign and are immune from the antitrust laws.

b. If the Midcal Test Applies, the Committee's Acts Meet It

Assuming *arguendo* that the Committee on Examinations and Admissions cannot claim state action immunity simply on the ground that it was acting as the state in its sovereign capacity, its acts are still immune because they satisfy the *Midcal* test as that test is applied to state agencies.

(1) The Committee Acted Pursuant to an Affirmatively Expressed State Policy

In determining whether private parties are entitled to state action immunity, this Court has required that "the challenged restraint . . . be 'one clearly articulated and affirmatively expressed as state policy' . . . ." *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc., supra,* 445 U.S. at 105.

In this case, the court of appeals held that the Arizona Committee on Examinations and Admissions had not met this part of the *Midcal* test because "the defendants here have no statute or Supreme Court Rule to point to as *directly requiring* the challenged grading procedure." Fn. omitted; emphasis added; 686 F.2d at 696. The court of appeals also held that the Arizona Supreme Court's delegation to the committee of general authority to examine applicants and the high court's review of the committee's recommendations regarding admission "does not alone clothe the Committee's unilateral grading policies with blanket immunity from the antitrust laws." *Ibid.*

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nation—was established as well as enforced by the Committee on Examinations and Admissions acting in its official capacity as a state agency. That trade restraint was not "essentially private," but was a necessary step in accomplishing the state's regulatory purpose.

These holdings disclose a two-fold misunderstanding of the first part of the *Midcal* test, at least as it applies to governmental entities. First, in *City of Lafayette* and *City of Boulder*, this Court held that for a *municipality's* acts to be immune, they need not be compelled or "directly required" by state policy. Immunity attaches so long as it is shown that "the State *authorized or* directed a given municipality to act as it did. . . ." Emphasis added; *City of Lafayette v. Louisiana Power & Light Co., supra*, 435 U.S. at 414, 416; *Community Communications Co. v. City of Boulder, supra*, 102 S.Ct. at 843-844; *Gold Cross Ambulance v. City of Kansas City*, 705 F.2d 1005, 1012 n. 11 (8th Cir. 1983); *Town of Hallie v. City of Eau Claire*, 700 F.2d 376, 381-382 (7th Cir. 1983), *petition for cert. filed*, 51 U.S.L.W. 3842 (U.S. May 11, 1983) (No. 82-1832); *United States v. Southern Motor Carriers Rate Conference*, 672 F.2d 469, 473 (5th Cir. 1982). *A fortiori*, a state agency need only be authorized, not required, to impose a restraint in order for state action immunity to attach.

Second, the Ninth Circuit's opinion in this case mistakenly requires "the state" to direct specifically the particular restraint under attack. *City of Lafayette* and *City of Boulder* show that such specificity is not required.

> This does not mean, however, that a political subdivision necessarily must be able to point to a specific, detailed legislative authorization before it properly may assert a *Parker* defense to an antitrust suit. While a subordinate governmental unit's claim to *Parker* immunity is not as readily established as the same claim by a state government sued as such, we agree with the Court of Appeals that an adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of." [Citation.]

Fn. omitted; *City of Lafayette v. Louisiana Power & Light Co., supra,* 435 U.S. at 415; *accord: Community Communications Co. v. City of Boulder, supra,* 102 S.Ct. at 840 n. 12; *Town of Hallie v. City of Eau Claire, supra,* 700 F.2d at 381; *Euster v. Eagle Downs Racing Ass'n, supra,* 677 F.2d at 995; *see* Areeda, *supra,* 95 Harv.L. Rev. at 445-446.'

Here, the Arizona Supreme Court plainly "contemplated the kind of activity complained of." *See Benson v. Arizona State Bd. of Dental Examiners, supra,* 673 F.2d at 275-276. It directed the committee to "examine applicants and recommend to this court for admission to practice applicants who are found by the committee to have the necessary qualifications." Ariz.Sup.Ct.R. 28(a). The committee's broad authority to examine applicants was restricted only

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'To require "the state" to specifically authorize each particular trade restraint, as the Ninth Circuit did in this case, would impose an impossible burden on state government, effectively preventing its legislature, governor and supreme court from delegating their functions. The courts have often recognized that modern government, state or federal, depends upon delegation to subordinate agencies under broadly phrased mandates. *See, e.g., Lichter v. United States,* 334 U.S. 742, 785 (1948); *Panama Refining Co. v. Ryan,* 293 U.S. 388, 421 (1934); *Horseman's Benevolent & Protective Ass'n v. Pennsylvania Horse Racing Comm'n,* 530 F.Supp. 1098, 1107-1108 (E.D.Pa. 1982), aff'd per curiam, 688 F.2d 821 (3d Cir. 1982). The Ninth Circuit's specific authorization requirement would prohibit such delegation.

Moreover, "the state" could not specifically authorize each potentially anticompetitive act of its subordinate agencies. The hair could always be split finer. Here, for example, following Ronwin's lead, another disappointed bar applicant could claim that the questions on the examination were selected for an unauthorized anticompetitive purpose or that particular answers were given lower grades for the same reason. To meet such claims, the Arizona Supreme Court presumably would have to specifically authorize each of those and a myriad of other details of the tasks it now delegates to the Committee on Examinations and Admissions.

by a rule specifying the subjects the bar examination should cover. Ariz.Sup.Ct.R. 28(c)(VII).

The supreme court contemplated that the committee would devise some method for scoring the bar examination; that is, of converting answers into "grades." Ariz. Sup.Ct.R. 28(c)(VII)(A). Whatever method the committee chose, it would exclude some would-be competitors from the market. *See Galahad v. Weinshienk*, 555 F.Supp. 1201, 1209 (D.Colo. 1983). Whatever the scoring method, those receiving lower grades would not be recommended for admission to practice.

Ronwin complains that the scoring method the committee chose—so-called scaled scoring[8]—was not the scoring method the Arizona Supreme Court intended. Compl., ¶ VI; Brief in Opposition to Petition for Certiorari, 9-12, 22. Ronwin is wrong for two reasons.

He incorrectly assumes that the supreme court specified a particular method of grading the bar examination. It did not. Ronwin relies on a version of rule 28(c)(VIII) which was superseded effective January 14, 1974, a month before he took and failed the examination. Even the superseded rule merely said 70 would be a passing grade, specifying neither the 0-100 grading scale Ronwin claims, nor the method for determining what grade to give an examina-

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[8]"In a series of tests, such as the MBE, which are intended to measure levels of competence, it is important to have a standardized score which represents the same level of competence from test to test. The raw score is not dependable for this purpose since the level of difficulty varies from test to test. It is not possible to draft two tests of exactly the same level of difficulty. Scaled scores are obtained by reusing some questions from earlier tests which have been standardized. A statistical analysis of the scores on the reused questions determines how many points are to be added to or subtracted from the raw score to provide an applicant's scaled score. Thus a particular scaled score represents the same level of competence from examination to examination."

The Bar Examiners' Handbook, supra, 61-62.

tion.[9] The new rule 28(c)(VII)(A) explicitly grants the committee discretion to use the grading or scoring system it deems appropriate. See n. 9 *supra*.

More importantly, Ronwin's complaint that the committee abused its discretion by choosing the wrong scoring method does not convert exempt state action into private action subject to antitrust scrutiny. The antitrust laws were not passed to allow federal courts to review state administrative actions for abuse of discretion.

To be sure, *Goldfarb v. Virginia State Bar, supra,* 421 U.S. at 790-791 holds that anticompetitive activity not "required" or "compelled" by "the State acting as sovereign" is not exempt from the Sherman Act. But it could not have been *Goldfarb's* intent to exempt only state administrative decisions which federal scrutiny finds to be honest, unbiased, disinterested and correct in law and fact. To limit *Parker* immunity so narrowly would be to "transform most state administrative law into a federal antitrust task," making federal courts the ultimate arbiters of whether state agencies have properly implemented the policies set by state legislatures, governors and supreme courts. Areeda, *supra,* 95 Harv.L.Rev. at 450.

Having one sovereign review another in this manner would violate the federalist underpinning of *Parker*. It

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[9]Grading a bar examination is not a simple process of counting the number of "correct" answers and dividing by the number of questions. Even on the multiple choice Multistate Bar Examination portion of the test, grading is considerably more complex. Scoring answers to essay questions is even more difficult, and combining the two scores in a meaningful way adds yet another layer of complexity to the process of grading the bar examination. *See, The Bar Examiners' Handbook, supra,* 271-302.

Recognizing these facts, the Arizona Supreme Court amended its rules 28(c)(VII) and (VIII) to make explicit what was implicit before. Effective January 14, 1974, rule 28(c)(VII) provided: "The Committee on Examinations may utilize the Multi-State Bar Examination sponsored by the National Conference of Bar Examiners and may utilize such grading or scoring system as the Committee deems appropriate in its discretion."

would do little to advance the true concerns of the antitrust laws, but would make administrative error and bias antitrust violations. *See id.*, at 454-455. Short of trial, it would effectively abolish the state action exemption; bias and abuse of discretion are easily alleged.

Having federal courts and juries reexamine a myriad of state agency decisions for bias and abuse of discretion would impose a heavy burden of litigation on the federal system and seriously interfere with state government. There is no need for such a massive shift in responsibilities from the states to the federal government. The states already provide ample remedies to correct their administrative agencies' errors.

When a subordinate state agency has acted to implement a clearly expressed state policy, the *Parker* exemption should apply whatever the agency's bias, interest, motive or error of law or fact. The exemption should be unavailable only when the agency's acts are "essentially private" in the sense that the state has not taken a position on the end to be accomplished by the agency's action *if properly carried out.*

> Wise and efficient federalism argues against review by antitrust courts of ordinary state agency errors. The *Lafayette* authorization requirement should not be manipulated to thwart the fundamental *Parker* policy against antitrust scrutiny of state action. The antitrust court should require only that the result of the agency's act or decision be of the sort contemplated by state anticompetitive policy. "Ordinary" errors or abuses in the administration of powers conferred by the state should be left for state tribunals to control.

Fn. omitted; Areeda, *supra*, 95 Harv.L.Rev. at 453; *accord: Llewellyn v. Crothers*, ... F.Supp. ....., 1983-1 Trade Cas. (CCH) ¶ 65,358, pp. 70,137-70,138 (D.Ore. 1983).

Antitrust review of a claimed abuse of discretion is particularly inappropriate in this case. Surely, the Arizona

Supreme Court knows best whether its Committee on Examinations and Admissions went beyond the guidelines the court had set in its own rules. Under those rules, Ronwin had the right to review of his failing grade by the Arizona Supreme Court. Ariz.Sup.Ct.R. 28(c)(XII)(C). He exercised that right, subsequently petitioning this Court for certiorari to review the Arizona Supreme Court's adverse decision. *Ronwin v. Committee on Examinations and Admissions,* 419 U.S. 967 (1974). It would certainly be anomalous for a federal district judge or jury now to decide that the Arizona Supreme Court misinterpreted its own rules. *See Gambrel v. Kentucky Bd. of Dentistry, supra,* 689 F.2d at 619.

In short, to the extent the committee's state action exemption depends upon the committee's having acted pursuant to a clearly articulated and affirmatively expressed state policy, that requirement was met by the Arizona Supreme Court's rules which delegate to the committee the tasks of preparing, administering and grading the bar examination and which therefore contemplate the kind of action complained of here; namely, the choice of a particular method for grading the test.

(2) Though State Agencies Need Not be "Actively Supervised," Petitioners Were

In its second aspect, the *Midcal* test requires that private parties' acts be " 'actively supervised' by the State itself" in order to acquire state action immunity. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., supra,* 445 U.S. at 105.

This Court has not yet determined whether state or municipal entities must meet this second prong of the *Midcal* test. *See Community Communications Co. v. City of Boulder, supra,* 102 S.Ct. at 841 n. 14. Three members of this Court, *id.,* at 851 n. 6 (Rehnquist, J., dissenting), and most lower courts have decided that active state supervision of public entities is not required. *Gold Cross Ambulance v.*

City of Kansas City, supra, 705 F.2d at 1014-1015; *Town of Hallie v. City of Eau Claire, supra,* 700 F.2d at 383-385; *Llewellyn v. Crothers, supra,* 1983-1 Trade Cas. (CCH) at p. 70,136; *Hybud Equip. Corp. v. City of Akron,* ..... F.Supp. ....., 1983-1 Trade Cas. (CCH) ¶65,356, pp. 70,123-70,124 (N.D. Ohio, 1983). As one lower court has pointed out, to ask whether "the state" actively supervises its own agencies is to ask a meaningless, tautological question. *Deak-Perera Hawaii, Inc. v. Department of Transportation,* 553 F.Supp. 976, 988-989 (D.Hawaii 1983); compare with *Euster v. Eagle Downs Racing Ass'n., supra,* 677 F.2d at 995-996; *Benson v. Arizona State Bd. of Dental Examiners, supra,* 673 F.2d at 275. This Court should now hold that public entities need not show that they are actively supervised by the state in order to claim state action immunity.

If applicable, the active state supervision requirement is met in this case. Like the state bar in *Bates v. State Bar of Arizona, supra,* the Committee on Examinations and Admissions' "role is completely defined by the [Arizona Supreme C]ourt; the [committee] acts as the agent of the court under its continuous supervision." *Id.,* 433 U.S. at 361; Ariz.Sup. Ct.R. 28(a), (c)(V)-(IX). The committee's recommendations regarding the qualifications of applicants for admission to practice "are subject to pointed re-examination by the policymaker—the Arizona Supreme Court—in . . . proceedings" to review an applicant's failure to receive a satisfactory grade. *Id.,* at 362; Ariz.Sup.Ct.R. 28(c)(XII)(C); *see, e.g., Application of Klahr,* 102 Ariz. 529, 433 P.2d 977 (1967).

The actions of the Committee on Examinations and Admissions meet the requirements of the *Midcal* test. The restraint challenged here is not a private practice masquerading under "a gauzy cloak of state involvement." Rather, it is a restraint imposed to implement the clearly articulated state policy of assuring lawyer competence; a restraint imposed by the committee, an official state agency, under authority granted by and under the supervision of the Arizona Supreme Court. It is state action.

3. The Noerr-Pennington Doctrine Shields Petitioners' Acts

"Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965); *accord*: *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). Last term, this Court reaffirmed that "the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances." *Bill Johnson's Restaurants, Inc. v. NLRB*, ... U.S. ....., 103 S.Ct. 2161, 2169 (1983). Unless engaged in as a "mere sham" for harassment purposes, acts initiating judicial proceedings are not prohibited by the antitrust laws. *Ibid.; California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510-511 (1972).

Like numerous other advisory boards,[10] the sole function of the Arizona Committee on Examinations and Admissions is to recommend to a state governmental entity—in this case, the Arizona Supreme Court—the action it should take. Arizona Supreme Court Rule 28(a) provides that the committee shall examine applicants and recommend those it

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[10]If this Court concludes that Ronwin's action is barred because it seeks collateral review of final judicial action by the Arizona Supreme Court, see pp. 12-14, *supra*, or because the state action exemption applies, see pp. 14-27, *supra*, it will be unnecessary to reach the issue of the *Noerr-Pennington* doctrine's application to the committee's recommendations. Nevertheless, the issue is one of broad application and general importance. Like the federal government, see H.R. Rep. No. 1017, 94th Cong., 2d Sess. (1972), reprinted in the 1972 U.S. Code, Cong. & Ad. News 3491, state governments rely on a wide array of advisory boards, committees and commissions, often composed of members of an affected industry, to provide information, recommendations and advice. Subjecting the recommendations of such advisory groups to antitrust scrutiny would gravely impair this necessary channel of information to state government.

finds qualified to the supreme court for admission to practice. "The [Arizona Supreme C]ourt will then consider the recommendations and either grant or deny admission." Ariz.Sup.Ct.R. 28(a).

The supreme court considers the committee's recommendations *de novo*, recognizing that "the admission to the practice of law is a judicial function [citation] [and] this court may, in the exercise of its inherent powers, admit to the practice of law with or without favorable action by the Committee. [Citations.]." *Application of Courtney*, 83 Ariz. 231, 319 P.2d 991, 993 (1957); *accord: Application of Klahr, supra*, 433 P.2d at 979.

On its own, the committee could not and did not prevent Ronwin from practicing law in Arizona. At worst, the result of its allegedly improper grading method was simply an incorrect recommendation, a recommendation that the supreme court deny Ronwin admission to practice. Whether or not motivated by anticompetitive purposes, that recommendation is just the sort of effort to influence official action which the *Noerr-Pennington* doctrine immunizes. *See New Motor Vehicle Bd. v. Orrin W. Fox Co., supra*, 439 U.S. at 110.

CONCLUSION

Insofar as it reinstated the complaint against petitioners, the judgment of the court of appeals should be reversed.

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Respectfully submitted,

KURT W. MELCHIOR
One Embarcadero Center,
25th Floor
San Francisco, CA 94111
(415) 398-3344
Attorney for Amicus Curiae National Conference of Bar Examiners

Of Counsel:
ALLAN ASHMAN
333 North Michigan Avenue,
Suite 1025
Chicago, IL 60601
JOHN E. HOLT-HARRIS, JR.
DEGRAFF, FOY, CONWAY,
HOLT-HARRIS & MEALEY
90 State Street
Albany, NY 12207
JAN T. CHILTON
SEVERSON, WERSON, BERKE
& MELCHIOR
A Professional Corporation
One Embarcadero Center
25th Floor
San Francisco, CA 94111